STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MANUEL CASTRO,

Defendant-Appellant.

UNPUBLISHED
January 26, 2006

No. 257849
Washtenaw Circuit Court
LC No. 03-000954-FH

Before: Bandstra, P.J., and Fitzgerald and White, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of one count of filing a false sworn statement over $100, in violation of the construction lien act, MCL 570.1110(10).[1] Defendant was sentenced to 120 days' incarceration and three years' probation, and was ordered pay $22,399 in restitution. We affirm.

Defendant first challenges a non-standard jury instruction read at the prosecution's request and over defendant's objection. This Court reviews claims of instructional error de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). Jury instructions are to be read as a whole, rather than extracted piecemeal, to establish error. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). The reviewing court must balance the general tenor of the instructions in their entirety against the potentially misleading effect of a single isolated sentence. *People v Freedland*, 178 Mich App 761, 766; 444 NW2d 250 (1989). "Even if somewhat imperfect, instructions do not warrant reversal if they fairly presented the issues to be tried and sufficiently protected defendant's rights." *Kurr*, *supra* at 327. Generally, juries are presumed to have followed the instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d

[1] MCL 570.1110(10) provided at pertinent times:

> A contractor or subcontractor who, with intent to defraud, gives or causes to be given to any owner or lessee, when he or she desires to draw money, a sworn statement as required by this section [MCL 570.1110], which is in fact false, is guilty of . . . a felony if [the statement involved] is for more than $100.00.

229 (1998). "Under MCR 2.516(D)(4), a trial court may give additional instructions concerning an area that was not covered in the standard jury instructions as long as these additional instructions accurately state the law and are applicable, concise, understandable, conversational, unslanted, and nonargumentative." *People v Lynn*, 229 Mich App 116, 121; 580 NW2d 472, rev'd on other grounds 459 Mich 53; 586 NW2d 534 (1998).

The challenged jury instruction is quoted below. The trial court instructed regarding the elements of filing a false sworn statement,[2] then read CJI 2d 6.5 (intent to injure or defraud), then gave the instruction defendant challenges, and then read CJI2d 3.9 (specific intent):

> The Defendant is also charged with the crime of false sworn statements over $100. To prove this charge, the Prosecutor must prove each of the following elements beyond a reasonable doubt: First, that the Defendant, being a contractor or subcontractor engaged in the building construction business, who either desired to draw money or did draw money, gave or caused to be given a false sworn statement to Jeffrey and/or Jacqueline Schulstrom through Gary Selesko of Title One. Second, the Defendant gave or caused to be given a false sworn statement with the intent to defraud. Third, that the amount of the statement was more than $100.
>
> When I say someone must act with the intent to defraud, I mean act to cheat or deceive, usually to get money, property or something else valuable or to make someone else suffer a loss. [CJI2d 6.5.]
>
> If you determine, beyond a reasonable doubt, that the Defendant, being a contractor engaged in the construction-building construction business, either desired to draw money or did draw money, gave or caused to be given a false sworn statement to Jeffrey and/or Jacqueline Schulstrom, through Gary Selesko of Title One, and that the amount of the statement was more than $100, *then these facts, if not explained, are circumstances from which you may infer the Defendant intended to cheat or defraud someone*. However, you do not have to make this inference. [Emphasis added.]
>
> These crimes require proof of a specific intent. This means the prosecution must prove, not only that the Defendant did certain acts, but he did the acts with the intent to cause a particular result. For these crimes, this means the prosecution must prove that the Defendant intended to defraud. The Defendant's intent may be proved by what he did, what he said, how he did it or by any other facts and circumstances in evidence. [CJI2d 3.9.]

Defendant contends that there is no statutory presumption in MCL 570.1110 that intent to defraud can be inferred from the surrounding facts, and thus that the challenged instruction was erroneous because it allowed the jury to presume that, if defendant was in fact a building

[2] There is no standard instruction for the crime of filing a false sworn statement.

contractor and withdrew over $100 from the trust account based on a false sworn statement, then defendant intended to defraud. Defendant notes that he did not receive the benefit of a counterbalancing instruction telling the jury that his actions in submitting a false sworn statement could have been consistent with intents other than to defraud.

We conclude that the challenged portion of the instruction should not have been read. The added portion of the instruction went too far by stating that if the jury found the non-intent elements of the crime were established, they could, on this basis alone, if not explained, infer the specific intent to defraud. Absent the added language, the instructions would have been unobjectionable.

We conclude, however, that reversal is not required. Defendant, in fact, offered an explanation. Thus, as a whole, the jury instructions adequately instructed that the jury had to find each of the elements of the crime beyond a reasonable doubt, including that defendant had the specific intent to defraud, and that such intent could be proved by "what he did, what he said, how he did it or by any other facts and circumstances in evidence." "The jury may draw the inference as to the intent with which a particular act was done as they draw all other inferences, from any fact in evidence which to their minds fully proves its existence." *People v Strong*, 143 Mich App 442, 452; 372 NW2d 335 (1985).

Defendant also challenges the jury instruction because "the jury was allowed to *infer* that if there was no payment to a subcontractor within some reasonable period of time after a draw then the sworn statement was *false*; and, from that inference the jury was *instructed* that they could *infer* specific intent to defraud." Defendant contends his conviction should be reversed because the jury was incorrectly instructed that they were permitted to base their guilty verdict on an inference based on an inference. We disagree.

The rule established in *People v Atley*, 392 Mich 298; 220 NW2d 465 (1974), that an inference cannot be built upon an inference to establish an element of an offense, was overruled in *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). "[I]f evidence is relevant and admissible, it does not matter that the evidence gives rise to multiple inferences or that an inference gives rise to further inferences." *Id.* Instead, "[i]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *Id.* Therefore, defendant's challenge fails.

Defendant also contends that the trial court's instructions as to a separate charge, of which defendant was acquitted, affected the jury's understanding of how intent to defraud could be established with regard to the crime of filing a false sworn statement. Again, juries are presumed to follow the instructions given, and the instructions given on the separate count, under which defendant was not convicted, clearly applied only to that count.

Defendant next argues the prosecution presented insufficient evidence of defendant's intent to defraud to support his conviction of filing a false sworn statement over $100. We do not agree. This Court reviews a claim of insufficient evidence in a criminal trial de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). This Court views the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could find

beyond a reasonable doubt that the essential elements of the crime were established. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005).

Defendant testified he did not intend to defraud any of the subcontractors or the Schulstroms when filing the sworn statements, and explained that the erroneous sworn statements were the result of unfamiliarity with the sworn statement forms and pressure from the Schulstroms to quickly finish construction of the house while including "extras" not incorporated in the budget. However, if believed, a number of other witnesses' testimony could establish that defendant intended to defraud; the issue is one of witness credibility. This Court defers to the jury's determination that defendant had the requisite intent to defraud regardless of his testimony to the contrary.

Defendant further argues that, in determining if he violated MCL 570.1110(10), the statute should be construed so as to effect its objectives. First, defendant argues that the purpose of the Construction Lien Act is to prevent owners from "excessive costs," as noted in *Vugterveen Systems, Inc v Olde Millpond Corp*, 454 Mich 119, 121; 560 NW2d 43 (1997). He argues that neither the Schulstroms nor the named subcontractors suffered any financial loss attributable to an intent to defraud on behalf of defendant.

Defendant also argues the Construction Lien Act is based on a "flow of information . . . necessary to allow the parties to protect their interests." *Schuster Constr Ser, Inc v Painia Development Corp*, 251 Mich App 227, 232; 651 NW2d 749 (2002), citing *Vugterveen, supra* at 121-124. He then argues that this imposes on all parties the duty to "affirmatively take part in the information exchange scheme that is set up by statute." Defendant contends the subcontractors and the homeowners did not "affirmatively take part in the information exchange scheme that is set up by statute" and, therefore, were at fault for any harm resulting from defendant's filing of a false sworn statement.

The *Vugterveen* Court noted that "the act's clear and unambiguous requirements should not be ignored." *Vugterveen, supra* at 121. MCL 570.1110(10) states that a contractor is guilty of a felony if he gives a false sworn statement with intent to defraud, and that requirement is stated without regard to the actions of the other parties involved. "If the language of a statute is clear, no further analysis is necessary or allowed to expand what the Legislature clearly intended to cover." *People v Monaco*, 262 Mich App 596; 686 NW2d 790 (2004). The statute does not require that the victims establish that they suffered any financial loss or that they take affirmative measures to prevent themselves from suffering any loss due to defendant's actions in order for defendant to be found guilty of violating MCL 570.1110(10). Therefore, we reject defendant's argument that these elements also had to be established in order that there be sufficient evidence to find defendant guilty of violating the statute.

Defendant next contests the $22,399 in restitution imposed on him at sentencing. This Court reviews the amount a trial court awards in restitution for an abuse of discretion. *People v Newton*, 257 Mich App 61, 68; 665 NW2d 504 (2003). MCL 780.767(1) states, "[i]n determining the amount of restitution to order under [MCL 780.766], the court shall consider the amount of the loss sustained by any victim as a result of the offense." MCL 780.767(4) states, "[a]ny dispute as to the proper amount or type of restitution shall be resolved by the court by a preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the prosecuting attorney." This statute "affords

defendant an evidentiary hearing when the amount of restitution is contested and further provides that the prosecution bears the burden of establishing the proper amount." *People v Gahan*, 456 Mich 264, 276; 571 NW2d 503 (1997). When a defendant fails to request an evidentiary hearing regarding the amount of restitution imposed, this is "a waiver of his opportunity for an evidentiary hearing." *Id.* Absent such an objection, "the court is not required to order, sua sponte, an evidentiary proceeding to determine the amount of restitution due." *Id.* at 276 n 17. Instead, "[a] judge is entitled to rely on the information in the presentence report, which is presumed to be accurate unless the defendant effectively challenges the accuracy of the factual information." *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997).

At the sentencing hearing, defendant did not request an evidentiary hearing contesting the amount of restitution recommended by the presentence report, even when the trial court indicated he could request such a hearing. Therefore, we find the trial court did not abuse its discretion in relying on the presentence report to impose $22,399 in restitution on defendant. Further, defendant presented no legal authority to support his contention that the award of attorney's fees as restitution constituted "indirect" financial harm and therefore should not have been awarded to defendant pursuant to MCL 780.766(1). "A party may not merely announce a position and leave it to [this Court] to discover and rationalize the basis for the claim." *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997). Therefore, we need not address this issue further.

Defendant also contends the trial court erred by permitting the prosecutor to question him regarding prior bad acts, specifically, claims made by other business associates and homeowners regarding "disagreements" arising in the course of defendant's work on these homes. We agree in part, but find the error harmless. "The scope of examination of witnesses rests within the sound discretion of the trial court, and the trial court's decision will not be overturned on appeal unless there is a clear abuse of that discretion." *People v Glover*, 47 Mich App 454, 459; 209 NW2d 533 (1973). This Court also reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). "This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling." *People v Walker*, 265 Mich App 530, 533; 697 NW2d 159, lv gtd on other grds 472 Mich 928; 697 NW2d 527 (2005).

Defendant opened the door to questioning regarding prior claims of disagreement and misappropriation of funds when, on direct examination, he answered his counsel's question regarding whether he ever intentionally misled anyone in regard to trying to complete this project with the statement, "I didn't have to do that and I never would do that."

Defendant argues that what he meant when stating "I never would do that" in response to counsel's question was that "he never would have misled the Schulstroms because he didn't have to." Yet a jury could reasonably interpret defendant's statement to mean that he never would intentionally mislead anyone regarding his contracting work on any construction project. The prosecutor noted her intent in cross-examining defendant regarding his prior bad acts was to impeach him regarding his statement that he "never would do that," undermining his credibility as a witness.

By questioning defendant regarding whether he had ever misappropriated funds, which by its very nature requires misleading others regarding the use of construction funds, the

prosecution properly inquired on cross-examination into the truth of defendant's statement, as is permitted by MRE 608(b).

However, the trial court abused its discretion by permitting the prosecutor to ask defendant a series of questions regarding whether other clients were "unsatisfied" with his construction work and whether he had "disagreements" with clients and employees. The prosecutor never indicated in her questioning if the alleged "disagreements" and dissatisfaction were the result of defendant intentionally misleading clients or employees in the course of a building project or how these allegations were probative of defendant's character for truthfulness. As defense counsel stated, "[t]hey may be dissatisfied because they just didn't like what they saw. That's not misleading or anything like that." Error on the part of the trial court in allowing this line of questioning was harmless, however. "An error in the admission or exclusion of evidence . . . is not ground for granting a new trial, [or] for setting aside a verdict . . . unless refusal to take this action appears to the court to be inconsistent with substantial justice." MCL 2.613(A).

> [T]he effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error. . . . [P]reserved, nonconstitutional error is not a ground for reversal unless "after an examination of the entire cause, it shall affirmatively appear" that it is more probable than not that the error was outcome determinative. [*Lukity*, *supra* at 495-496.]

As discussed *supra*, the prosecution presented ample untainted evidence from which a reasonable jury could conclude beyond a reasonable doubt that defendant filed a false sworn statement over $100 with the intent to defraud, and we are satisfied that the exclusion of this evidence would not have changed the verdict.

Finally, defendant contends the prosecutor misstated the law during closing arguments, committing an act of prosecutorial misconduct, when she told the jury that not putting the name of a specific subcontractor on a sworn statement constituted fraud. Defendant failed to object at trial. Unpreserved issues of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). Error affects substantial rights if it is outcome-determinative; therefore, "[a] reviewing court should reverse only if the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Walker*, *supra* at 542.

Prosecutorial misconduct issues are decided on a case-by-case basis; the reviewing court must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context to determine if the defendant was denied a fair and impartial trial. *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002). A defendant may be denied a fair trial if the prosecutor makes a clear misstatement of the law that remains uncorrected, but even an erroneous legal argument made by the prosecutor can potentially be cured if the jury is correctly instructed on the law. *Id.* However, "'[p]rosecutors are accorded great latitude regarding their arguments and conduct.' They are 'free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case.'" *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (citations omitted).

The prosecutor's remark, read in context, was not that failure to state the name of the subcontractors being paid on the sworn statement, standing alone, constituted fraud. Rather, the prosecutor stated that the fact that defendant did not pay certain subcontractors spoke to the intent portion of the statute, and the fact that defendant did not put the correct names on the sworn statement showed an intent to defraud. The prosecutor's statements, intended as argument, were arguing that defendant's intent was demonstrated from the evidence taken as a whole. We find no error requiring reversal.

Affirmed.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Helene N. White